STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 3, 2000
v	No. 212189 Oakland Circuit Court
STANLEY D. BURKETT, Defendant-Appellant.	LC No. 95-138765 FC

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

The jury convicted defendant of possession of 50 grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), felonious assault, MCL 750.82; MSA 28.277, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to two concurrent two-year prison terms for the felony-firearm convictions, and consecutive terms of ten to twenty years' imprisonment for the possession with intent to deliver cocaine conviction and one to four years' imprisonment for the felonious assault conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence.

I

We first address the issues raised in appellate counsel's brief. Defendant argues that he was denied a fair trial because the prosecutor elicited testimony concerning the substance of an informant's tip. The tip alerted police that defendant would allegedly be delivering a quarter kilogram of cocaine while driving a Bronco in the vicinity where the police ultimately observed and apprehended the defendant. Defendant failed to preserve this issue for appeal by failing to object to its admissibility at trial. MRE 103(a)(1); *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000), motion for rehearing pending. Therefore, defendant must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The evidence concerning the substance of the informant's tip is not hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). A statement offered

to show its effect on the hearer is not hearsay. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995). Examined in context, the record reflects that the prosecutor elicited the challenged testimony to explain why the police officers were conducting surveillance, not to prove the truth of the matter asserted. Thus, the evidence does not plainly constitute improper hearsay.

However, we find merit to defendant's claim that the substance of the informant's tip lacked relevancy. In this regard, we do not disagree with the prosecution's claim that evidence about what an informant said may be viewed as part of the "complete story" of what occurred. *People v Cash*, 419 Mich 230, 249; 351 NW2d 822 (1984). Indeed, under the rule of completeness, such evidence would be admissible based on the premise that an act cannot be accurately understood without considering its entire context. See *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990). However, relevant evidence has two components, materiality and probative force. *People v Starr*, 457 Mich 490, 497-498; 577 NW2d 673 (1998). Evidence is material if it is logically relevant to an issue or fact of consequence to the action. *Id.* at 497. While the fact of the informant's tip may have logical relevancy, examined from the perspective of what the prosecutor was trying to establish through the testimony (e.g., why the police officers were in the area of Roselawn Street), the substance of the tip provided by the informant was not. *People v Wilkins*, 408 Mich 69, 73-74; 288 NW2d 583 (1980). Hence, the testimony, as elicited by the prosecutor to explain the police presence, should have been limited in scope to a more general explanation about the police conducting surveillance as a result of a tip. MRE 105; *Wilkins, supra* at 73. See also *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000).

However, the record reflects that defense counsel attempted to use the substance of the informant's tip to attack the credibility of the prosecution's proofs. Without the evidence, defense counsel would not have been able to argue, as he did, that "there's supposedly $20,000 worth of cocaine sitting on Shirley Street? No, I don't believe so. It's not going to happen. And it didn't happen in this case. There would not -- and I'm telling you, they would not have left those drugs sitting there while Mr. Burkett goes all the way down East Boulevard." Because the challenged evidence was material to the defense strategy, we conclude that, even if it was plain error for the prosecutor to elicit the challenged testimony, it does not require reversal because it did not affect defendant's substantial rights. *Carines, supra* at 763.

Because unpreserved constitutional and nonconstitutional errors are reviewed under the same standard, *Carines, supra* at 774, we likewise conclude that defendant cannot succeed on his unpreserved claim that he was denied his constitutional rights of confrontation and a fair trial with respect to this issue. Defendant's failure to show that the challenged testimony was hearsay is fatal to his claim that he was denied the right of confrontation. Statements that are not offered to prove the truth of the matter asserted carry no constitutional implications under the Confrontation Clause. *Cargill v Turpin*, 120 F3d 1366, 1375 (CA 11, 1997). See also *Dutton v Evans*, 400 US 74, 88; 91 S Ct 210; 27 L Ed 2d 213 (1970).

Defendant also contends that the prosecutor improperly vouched for the credibility of her witnesses during closing and rebuttal arguments. Because defendant did not object to the challenged remarks and has not shown plain error affecting his substantial rights, we find no basis for reversal.

Carines, supra; *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000), lv pending. Moreover, the prosecutor was permitted to argue the credibility of the witnesses. *People v Smith,* 158 Mich App 220, 231; 405 NW2d 156 (1987). Viewing the challenged remarks in context, the prosecutor did not convey to the jury any special knowledge of facts bearing on the credibility of the witnesses. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Further, the prosecutor's use of the phrase "good cops" does not rise to a level requiring reversal because it appears to be no more than a response to defense counsel's assertion in his closing argument, that this case involved "bad cops". *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Examined in context, the challenged remark did not deprive defendant of a fair trial.

Defendant further asserts that the prosecutor's remarks in closing and rebuttal arguments improperly shifted the burden of proof to defendant. Because defense counsel did not object to either of the challenged remarks as a burden-shifting argument, but only objected to the rebuttal remark on the ground that it lacked evidentiary support, we find that this issue is not preserved for appeal. An objection on one ground does not preserve an appellate attack on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Further, defendant has not shown plain error affecting his substantial rights. *Carines, supra* at 763; *Schutte, supra* at 720.

The prosecutor did not plainly make a burden-shifting argument or draw attention to defendant not testifying. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). The prosecutor attacked the weakness of defendant's theory that someone other than defendant was in the area who could have fired the gun. A prosecutor may comment on the weakness of a defense theory. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995); *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Further, the trial court's instructions to the jury regarding the prosecutor's burden of proving all elements beyond a reasonable doubt, that the lawyers' statements are not evidence, that "defendant is not required to prove his innocence or to do anything," and that "every defendant has the absolute right not to testify" were sufficient to dispel any alleged prejudice stemming from the prosecutor's remarks. *Bahoda, supra* at 281. Thus, the prosecutor's remarks did not affect defendant's substantial rights or deprive him of a fair trial.

Additionally, defendant claims, erroneously, that the trial court erred by refusing to instruct the jury on the lesser offense of reckless discharge of a firearm in relation to the charged offense of assault with intent to commit murder. Our review of the entire record makes clear that the trial court did not abuse its discretion in denying the requested instruction. *People v Steele*, 429 Mich 13, 22; 412 NW2d 206 (1987). (Text deleted)

II

We next consider the issues raised in defendant's supplemental pro se brief. Defendant claims that he was denied due process because the court allowed Sergeant Valard Gross to provide expert testimony concerning the intent to deliver element of the drug charge. Defendant waived any challenge to Sergeant Gross' qualifications because defense counsel stipulated to his expertise. Further, defendant waived his right to appeal the substance of Sergeant Gross' testimony by failing to make any objection

at trial. MRE 103(1)(a); *Carter, supra*. Also, defendant failed to show plain error affecting his substantial rights. MRE 103(d); *Carines, supra* at 763.

Moreover, defendant has not established that Sergeant Gross provided improper expert "drug profile" testimony, or that the admission of his testimony, as an expert is plain error. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999); *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995). Sergeant Gross was not the only qualified expert who testified at trial. Officer Story also provided expert testimony concerning defendant's intent to deliver, based on the quantity of crack cocaine seized and its selling price on the street. This type of expert testimony is proper. *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Accordingly, defendant failed to show established plain error. *Carines, supra* at 763-764.

Defendant also raises claims concerning the sentencing proceeding. Having considered defendant's arguments, we find no basis for relief. Defendant's challenge to the contents of the presentence report was not preserved for appeal by an objection at or before sentencing and, therefore, affords no basis for relief. MCR 6.429(C); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Indeed, we note that defense counsel expressly informed the trial court that there were no additions or deletions to be made.[1]

We also find no merit to defendant's claim that the sentencing guidelines were applicable at the May 1998 sentencing hearing. Although defense counsel indicated at sentencing that he had computed a minimum sentence range for the felonious assault conviction, the sentencing guidelines were not controlling for any conviction because there were no guidelines for this offense. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). See *People v Comagnari*, 233 Mich App 233, 235; 590 NW2d 302 (1998). By statute, defendant was subject to a mandatory minimum sentence of not less than ten years for the drug offense, unless there were substantial and compelling reasons to depart from the statutory minimum. MCL 333.7401(2)(a)(iii) and (4); MSA 14.15(7401)(2)(a)(iii) and (4). The sentencing record reflects that the trial court was aware of and applied this statutory standard.

Defendant's claim that the trial court misunderstood the law -- that it could not impose a probation sentence for the felonious assault conviction – is incorrect. The trial court's response to defense counsel's request for a probation sentence under *People v Brown*, 220 Mich App 680; 560

---

[1] We note that there is no merit in defendant's argument that he was harmed by the incomplete sentencing information report for assault with intent to commit murder attached to the presentence report. It is apparent from the presentence report prepared for defendant's May 1998 sentencing hearing that the sentencing information report was an attachment only because a prior presentence report for an earlier sentencing hearing was attached for background information. Defendant had previously pleaded nolo contendere to assault with intent to commit murder. That plea was later withdrawn before sentencing. The updated information in the presentence report for the May 1998 sentencing proceeding fully discloses that defendant was found not guilty of assault with intent to commit murder by the jury. Hence, while the incomplete sentencing information report was not relevant to the May 1998 sentencing, we find no basis for defendant's claim that its attachment to the presentence report was harmful.

NW2d 80 (1996), shows that the court concluded only that a probation sentence was not factually appropriate. Because defendant has not shown that the trial court imposed an invalid sentence, we deny his request for resentencing. *In People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997); *In re Dana Jenkins*, 438 Mich 364, 369; 475 NW2d 279 (1991).

Defendant also claims that he was denied due process and that the circuit court lacked jurisdiction because he was charged under an erroneous statute, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), for the drug charge. We disagree. The circuit court acquired jurisdiction from the return filed by the magistrate. *People v Goecke*, 457 Mich 442, 459; 579 NW2d 868 (1998). Further, defendant has not shown plain error affecting his substantial rights. *Carines, supra* at 763. However, because the judgment of sentence contains the erroneous statutory citation, we remand this case for the limited purpose of correcting the judgment to reflect the proper citation for the actual conviction offense of possession with intent to deliver fifty grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Cf. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999). See also MCR 7.216(A)(1) and MCR 6.435(A).

Finally, defendant has not shown any basis for relief due to ineffective assistance of counsel. *Avant, supra* at 507. Further, we are not persuaded that the case should be remanded for a hearing on defense counsel's performance under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant has not show that the case merits a remand. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Defendant's convictions and sentences are affirmed, but the case is remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter